IN THE

Supreme Court of the United States

October Term, 1978

No. 78-685

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

MOTION OF PPG INDUSTRIES, INC. FOR LEAVE TO INTERVENE AND BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

HENRY M. WICK, JR.
CHARLES J. STREIFF
WICK, VUONO & LAVELLE
2310 Grant Building
Pittsburgh, Pennsylvania 15219
Attorneys for Intervenor PPG Industries, Inc.

November 21, 1978

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON, SENIOR REPRESENTATIVE
HAROLD L. BERROBEN, REPRESENTATIVE
1701 PARKLINE DR., PITTSBURGH, PA. 15227
(412) 881-7483

INDEX.

	Page
Motion of PPG Industries, Inc. for Leave to Intervene	1
Appendix A—Order of the United States Court of Appeals for the District of Columbia Circuit Dated July 27, 1978	4
Brief in Opposition to Writ of Certiorari	6
Decision Below	7
Jurisdiction	7
Question Presented	7
Statutes Involved	7
Statement of the Case	8
Reasons for Denying this Writ	10
Argument	11
I. Petitioners have no right of review of general rate increase orders as they apply to specific commodities	11
II. The Commission's review of particular commodities in a general rate increase case was not a change from past practice and was not in violation of the provisions of the 4-R Act	14
III. The Commission did not act arbitrarily in selecting certain commodities for investigation	17
IV. The Commission's investigation procedure was not a denial of the Petitioners' due process of law	18
Conclusion	20

Page

INDEX OF AUTHORITIES.

Judicial Decisions:

Algoma Coal & Coke Co. v. United States, 11 F.Supp. 487 (E.D. Va. 1935) 11
Asphalt Roofing Mfg. Assoc. v. I.C.C., 567 F.2d 994 (D.C. Cir. 1977) 11
Council of Forest Industries of British Columbia v. I.C.C., 570 F.2d 1056 (D.C. Cir. 1978) 10,11,12,14
Electronics Industries Ass'n v. United States, 310 F.Supp. 1286 (D.C. Cir. 1970), *aff'd* 401 U.S. 967 (1971) ... 11
Florida Citrus Comm'n v. United States, 144 F.Supp. 517 (N.D. Fla. 1956), *aff'd mem.* 352 U.S. 1021 (1957).. 11
Koppers Company v. United States, 132 F.Supp. 159 (W.D. Pa. 1955) 11

Administrative Proceedings:

Increased Freight Rates, 1968, 332 I.C.C. 714 (1969) .. 15
Increased Freight Rates and Charges, 1972, 341 I.C.C. 290 (1972) 15
Increased Freight Rates and Charges, 1973, Nationwide, 344 I.C.C. 589 (1973) 15
Fifteen Percent Case, 1931, 178 I.C.C. 539 (1931) 14,19

Statutes and Regulations:

Administrative Procedure Act Section 556(d), 5 U.S.C. § 556(d) 19
Revised Judicial Code Section 2348, 28 U.S.C. § 2348. 9
Interstate Commerce Act (as amended by the Railroad Revitalization and Regulatory Reform Act of 1976)
Section 1(5), 49 U.S.C. § 1(5) 12
Section 13(1), 49 U.S.C. § 13(1) ..... Passim
Section 15(1), 49 U.S.C. § 15(1) ..... Passim
Section 15(8)(a), 49 U.S.C. § 15(8)(a) 14

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-685

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

MOTION OF PPG INDUSTRIES, INC. FOR LEAVE TO INTERVENE

AND NOW, PPG Industries, Inc. (PPG), by its attorneys, Wick, Vuono & Lavelle, 2310 Grant Building, Pittsburgh, Pennsylvania 15219, respectfully moves this Court for leave to intervene in support of Respondents in the above-captioned proceeding, and in support thereof states as follows:

1. This proceeding was instituted by a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit (Petition), dated October 23, 1978.

2. The Petition requests the review of the July 25, 1978 Order of the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals) at No. 78-1636 dismissing the Petitioners' Petition for Review of an order entered by the Interstate Commerce Commission in *Ex Parte No. 343, Nationwide Increased Freight Rates and Charges, 1977,* served June 29, 1978. The Petitioners also filed a Motion for Stay Pending Review with the Court of Appeals in the same proceeding.

3. The proceeding before the Commission was instituted by the United States railroads for the purpose of securing approval of a general increase in freight rates and charges. PPG, with its offices located at One Gateway Center, Pittsburgh, Pa. 15222, protested the application of the general increase to the commodities of chlorine and caustic soda, and was an active participant in the proceeding before the Commission. PPG is a substantial shipper of chlorine and caustic soda, and, accordingly, its interests were substantially affected by the Commission proceeding.

4. PPG, as a party in interest to the proceeding before the Commission, filed a Motion for Leave to Intervene in support of Respondents in the proceeding before the Court of Appeals at No. 78-1636, pursuant to the provisions of 28 U.S.C. § 2348, which permits a party in interest to intervene as of right in the review of a Commission's order by a court of appeals.

5. The Court of Appeals, by order dated July 25, 1978, dismissed the Petitioners' Petition for Review at No. 78-1636, based on a Motion to Dismiss filed by the Respondents. The Court of Appeals also dismissed Petitioners' Motion for Stay Pending Review as moot. The said order is attached to Petitioners' Petition as Appendix B.

6. PPG, and other shippers, also filed motions to dismiss the Petition for Review and answers to the Motion for Stay Pending Review. The Court of Appeals, by order dated July 27, 1978, dismissed the motions and answers filed by PPG and other shippers as moot. A copy of said order is attached hereto as Appendix A.

7. PPG now requests leave to intervene in this proceeding and permission to file the attached Brief in Opposition for Writ of Certiorari. PPG would already be a party to the proceeding before this Court, pursuant to the provisions of 28 U.S.C. § 2348, except that the Court of Appeals had already dismissed Petitioners' Petition for Review prior to considering PPG's Motion for Leave to Intervene.

8. Intervention by PPG will not broaden the issues in this proceeding or cause prejudice to the Petitioners.

WHEREFORE, PPG Industries, Inc., respectfully requests that it be permitted to intervene in the above-captioned proceeding in support of Respondents, and upon intervention, be permitted to file the attached Brief in Opposition for Writ of Certiorari.

Respectfully submitted,

HENRY M. WICK, JR.,
CHARLES J. STREIFF,
WICK, VUONO & LAVELLE,
2310 Grant Building,
Pittsburgh, Pa. 15219,
Attorneys for Intervenor
PPG Industries, Inc.

Dated: November 21, 1978.

APPENDIX A

Order of the United States Court of Appeals for the District of Columbia Circuit Dated July 27, 1978

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 78-1636 September Term, 1977

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *ET AL.*,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On consideration of the motions of

1. National Association of Recycling Industries, Inc.,

2. The Fort Howard Paper Company of Green Bay, Wisconsin

3. Allied Chemical Corporation, *et al.*,

4. PPG Industries, Inc.,

for leave to intervene and it appearing that an order was filed herein on July 25, 1978 granting respondents' motion to dismiss, and denying petitioner's motion for stay as moot, it is

ORDERED that the aforesaid motions for leave to intervene are denied as moot.

FOR THE COURT:
GEORGE A. FISHER, CLERK,
BY: DANIEL M. CATHEY,
Daniel M. Cathey,
First Deputy Clerk.

United States Court of Appeals
for the District of Columbia Circuit
Filed Jul 27 1978
George A. Fisher
Clerk

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-685

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Intervenor-Respondent, PPG Industries, Inc., prays that the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, filed by the Petitioner railroads, requesting the review of the order of the United States Court of Appeals for the District of Columbia

Circuit entered on July 25, 1978 in the proceedings styled *Aberdeen and Rockfish Railroad Company v. Interstate Commerce Commission and United States of America,* No. 78-1636, be denied in its entirety.

Decision Below

A panel of the United States Court of Appeals for the District of Columbia granted without opinion a motion to dismiss a petition for review of the Decision and Order of the Interstate Commerce Commission (the Commission) served June 29, 1978 in proceedings styled *Ex Parte No. 343, Nationwide Increased Freight Rates and Charges, 1977.* The order of the Court of Appeals dismissing the petition for review is attached to the Petition as Appendix B and the Decision and Order of the Commission as Appendix C.

Jurisdiction

The jurisdictional requisities are adequately set forth in the Petition.

Question Presented

Whether the Court of Appeals erred in granting a motion to dismiss a petition for review of an order of the Interstate Commerce Commission in which the Commission found that the evidence submitted by the Petitioners did not fully justify the grant of a five percent general rate increase on seven specific commodity groups?

Statutes Involved

The pertinent provisions of the Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. 94-210; 90 Stat. 31) are set forth in the Petition as Appendix D.

Statement of the Case

On September 26, 1977 the Petitioners petitioned the Commission for authorization to increase their freight rates from, to and within all territories by five percent, effective November 30, 1977, allegedly in order to offset increases in the cost of labor, materials and supplies. The Commission, by order served on September 29, 1977, authorized the filing and publication of a tariff of increased rates with appropriate refund provisions, to become effective no earlier than November 30, 1977, subject to protest and possible suspension. The Commission also provided for the filing of protests and replies thereto.

After consideration of protests, replies and oral argument, the Commission, by order served on November 10, 1977, refused to suspend the five percent general rate increase requested by the Petitioners. However, the Commission did institute an investigation into the lawfulness of the increase as it applied to the following commodities: (1) newsprint paper, (2) sodium alkalies, (3) industrial gases, (4) sulphuric acid, (5) rubber (natural or synthetic), (6) manufactured iron or steel, and (7) recycables. The Commission also directed all parties to submit briefs on the question of the interrelationship of the special rate provisions of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act) and railroad general rate increase proceedings.

Intervenor-Respondent, PPG Industries, Inc. (PPG), is a substantial supplier of chlorine (industrial gas) and caustic soda (sodium alkali), producing and shipping these commodities by rail from plants located in Louisiana, Ohio and West Virginia. PPG took an active part in the proceeding before the Commission and on February 13, 1978 submitted substantial evidence, in the form of verified statements and

argument, which demonstrated that the Petitioners' pricing practices on chlorine and caustic soda have resulted in excessive rates and earnings for the railroads. Similar evidence concerning chlorine and caustic soda was submitted by other protestant shippers.

On June 29, 1978, the Commission concluded its investigation of the lawfulness of the five percent increase as applied to the seven specified commodity groups and its consideration of the interrelationship of the rate provisions of the 4-R Act and general rate increase proceedings. By Decision and Order served on that date, the Commission granted the Petitioners authority to establish increases in the rates on the seven specified commodities from two to three percent and directed them to make appropriate refunds in view of the five percent increase which it had allowed to go into effect. Specifically in regard to chlorine and caustic soda, the Commission permitted an increase of two percent based on the protestant shippers' cost evidence, which demonstrated that any additional increases were not supported by the record.

On July 10, 1978, Petitioners filed in the Court of Appeals their petition for review of the Commission's June 29, 1978 Decision and Order, together with a motion for stay pending review. The Commission and certain shipper groups, including PPG, opposed the motion for stay pending review and, in addition, filed motions to dismiss the petition for review. PPG and the other shipper groups also filed motions for leave to intervene with the Court of Appeals in support of Respondents pursuant to the provisions of the Judicial Code (28 U.S.C. § 2348), which permits a party in interest to a proceeding before the Commission to appear as of right in the review of the subject proceeding by a court of appeals.

On July 25, 1978, the Court of Appeals granted the Respondents' motion to dismiss the petition for review. Subsequently, on July 27, 1978, the Court of Appeals dismissed the motions for leave to intervene filed by the shipper groups as moot. The Court of Appeals July 27, 1978 order is set forth in Appendix A to Intervenor-Respondent PPG's concurrently filed motion for leave to intervene with this Court.

Reasons for Denying this Writ

The Court of Appeals committed no error in granting Respondents' motion to dismiss Petitioners' petition for review. Respondents' motion to dismiss was predicated on the holding in *Council of Forest Industries of British Columbia v. I.C.C.*, 570 F.2d 1056 (D. C. Cir. 1978), and supported by a long line of precedents, that judicial review of a Commission order in a general rate increase proceeding is not available to shippers which challenge the effect of such an order on specific commodities; those shippers must first exhaust the remedies available to them under Sections 13 and 15 of the Interstate Commerce Act (the Act). These cases have direct application to the Petitioners' petition for review of the Commission's June 29, 1978 Decision and Order.

The Petitioners also raise additional arguments concerning the application of the 4-R Act to general rate increase proceedings and the alleged denial of due process of law. Although these issues will be discussed, they should be disregarded since the only issue to be decided is whether the Court of Appeals has jurisdiction over the proceeding in controversey. As is apparent from the Court of Appeals' July 25, 1978 Order, it dismissed Petitioners' petition for review on the basis of lack of jurisdiction, and, as a result, this is the only issue properly before this Court.

ARGUMENT

I.

Petitioners have no right of review of general rate increase orders as they apply to specific commodities.

The Court of Appeals, in dismissing the petition for review, stated that the dismissal was based on a consideration of Respondents' motion to dismiss. Respondents' motion to dismiss rested on the Court of Appeals decision in *Council of Forest Industries of British Columbia v. I.C.C.*, 570 F.2d 1056 (D.C. Cir. 1978), where it was held that review of a Commission order in a general increase proceeding is not available to shippers which challenge the effect of such an order on specific commodities. The Court of Appeals stated that it was "settled" law that challenges of such narrow scope must be brought in complaint proceedings under Sections 13 and 15 of the Act, citing *Electronics Industries Ass'n v. United States*, 310 F.Supp. 1286 (three judge court) (D. C. Cir. 1970), *aff'd* 401 U.S. 967 (1971).

The Court of Appeals decision in *Electronics Industries* was based on the doctrine initially stated in *Algoma Coal & Coke Co. v. United States*, 11 F.Supp. 487 (three judge court) (E.D. Va. 1935), that a Commission order in a general rate increase case leaves questions concerning particular rates to be determined in later Commission proceedings, and, therefore, appropriate administrative remedies have not been exhausted. This doctrine has been consistently upheld by reviewing courts. *See, e.g., Asphalt Roofing Mfg. Assoc. v. I.C.C.*, 567 F.2d 994 (D.C. Cir. 1977); *Florida Citrus Comm'n v. United States*, 144 F.Supp. 517 (three judge court) (N.D. Fla. 1956), *aff'd mem.* 352 U.S. 1021 (1957); *Koppers Company v. United States*, 132 F.Supp. 159 (three judge court) (W.D. Pa. 1955).

In *Council of Forest Industries*, this doctrine was upheld despite the claim that the Commission's action constituted broad territorial discrimination against a significant section of an entire industry. In rejecting this claim as a basis for review, the Court of Appeals held that: (1) a general proceeding was not necessary to grant relief desired, and (2) the Commission's action was not a final determination of Petitioners' claims. 570 F.2d at 1064. These holdings are controlling in the instant case, and require the denial of Petitioners' Petition.

Petitioners contend that the Commission's action in this case was comparable to a Section 13(1) or 15(1) proceeding, was a "final" order and that no other proceeding is available for the Petitioners to present these issues. Petitioners seek a "limited" rule that, where the Commission, in a general revenue increase proceeding, ". . .conducts an investigation with respect to rates for specific commodities and makes a determination with respect to the lawfulness of such rates, its orders shall be reviewable to that extent." (Petition, page 9).

Petitioners are in error. The Commission in this proceeding did institute an investigation into the lawfulness of the five percent increase on certain commodity groups, stating that the issue to be resolved was ". . .[w]hether the 5-percent increase on the commodity groups under investigation is just and reasonable." (Appendix C to Petition, page 31a). However, the Commission did not undertake to consider the lawfulness of specific rates on the involved commodities from specific origins to specific destinations, as it would in a Section 13(1) or 15(1) complaint proceeding or an investigation and suspension proceeding. Nor did it issue an order setting a maximum reasonable rate level under Section 1(5) of the Act.

The Commission did find that the Petitioners had not fully justified the proposed five percent cost increase, and that a

lesser increase was justified due to the Petitioners' overall revenue needs. As to sodium alkalies and industrial gases, the Commission found that the

> . . .shippers have provided persuasive evidence to warrant limiting the increase on these commodities to 2 percent. (Appendix C to Petition, p. 36a).

In its specific findings as to sodium alkalies and industrial gases, the Commission further stated that

> [b]ased on the evidence submitted we find that the railroads have failed to show that the 5-percent increase on these commodities is just and reasonable. (Appendix C to Petition, p. 48a).

These are not "final" orders as to the maximum reasonable level of any specific rate; rather these are findings that the Petitioners did not meet their burden of proof imposed by Section 15 of the Act to show that the proposed across-the-board percentage increases were just and reasonable. These findings do not prevent the Petitioners from litigating the lawfulness of individual rate increases on these commodities. The Petitioners can file tariffs at any time increasing rates on any commodity if they believe such increases can be justified, and shippers must then meet a heavy burden to secure suspension of such increases. In fact, this Court may take judicial notice of the fact that the Petitioners have requested the Commission to grant two additional general rate increases since the Commission's consideration of this proceeding: *Ex Parte No. 349, Increased Freight Rates and Charges, 1978, Nationwide*—4 percent general rate increase on various commodities except for a 2 percent increase from, to and within Southern Territory; *Ex Parte No. 357, Increased Freight Rates and Charges Nationwide—8 Percent*—8 percent general rate increase on various commodities, with certain exceptions. In any event, if the rate increase is suspended, there is an ex-

pedited procedure prescribed in Section 15(8) (a) of the Act to secure a final decision from the Commission on the lawfulness of the specific rate in issue.

In short, the Petitioners are in error in stating that they are faced with a final order on the lawfulness of rates on specific traffic. The Commission's June 29, 1978 Decision and Order did not prescribe maximum reasonable rates and the Petitioners are free to take appropriate action to file specific rates and seek a final order on the lawfulness of specific rates. As the Court of Appeals stated in *Council of Forest Industries of British Columbia,* "[a] general proceeding is not necessary to resolve these arguments [of Petitioners] or grant the relief they require." 570 F.2d at 1064. Consistent with this holding, this Court should deny Petitioners' Petition.

II.

The Commission's review of particular commodities in a general rate increase case was not a change from past practice and was not in violation of the provisions of the 4-R Act.

The Petitioners contend that the Commission's procedure in this proceeding of reviewing particular commodities in a general rate increase case represents a departure from past practice, and was an attempt by the Commission to shift the burden of proof to the railroads. These contentions are erroneous.

As early as 1931, the Commission concluded in *Fifteen Percent Case, 1931,* 178 I.C.C. 539, 577 (1931), that it would not permit a general revenue increase in the amount sought by the railroads, because the increase would raise the level of rates above a reasonable level, particularly on agriculture products. The railroads were directed to consider both in-

creases and decreases, on specific traffic, as a preferable method of securing revenue. Further, a review of recent general rate increase proceedings shows that the Commission has investigated particular commodities, based on evidence adduced from both the railroads and the protesting shippers. For example, in *Increased Freight Rates and Charges, 1972,* 341 I.C.C. 290 (1972), the Commission found that the railroads had not justified the proposed rate increase on woodpulp traffic moving within Official Territory and, therefore, did not permit an increase in rates as to that commodity. 341 I.C.C. at 493-97. In the same proceeding, the Commission also granted selective partial increased rates on certain commodities (*e.g.,* the proposed six percent increase on fluorocarbons was cut back to four percent). *Id.* at 416-18.

An even more striking example of the Commission's exercise of selective rate application is found in *Increased Freight Rates, 1968,* 332 I.C.C. 714 (1969). In that case the railroads proposed increases varying from three to ten percent. The Commission, in its decision, was selective and permitted some flat increases, scaled down certain proposed rates, and applied increases to other commodity groups. And, in *Increased Freight Rates and Charges, 1973, Nationwide,* 344 I.C.C. 589 (1973), the Commission approved a three percent general rate increase, despite the fact a five percent increase had been proposed by the railroads. The Commission also specifically commented that, as to coal, protestant shippers had presented extensive cost evidence of coal traffic profitability, but that the railroads had elected not to supply expense and revenue data. The Commission held that in ". . .[t]he absence of a more detailed showing by respondents, we cannot approve a higher increase on coal in the East than on traffic generally." 344 I.C.C. at 653. Thus, the Commission gave effect to cost evidence in requiring a holddown to three percent.

The Petitioners further contend that the Commission erred in finding that the 4-R Act permits the investigation of particular commodities in a general rate increase proceeding. In this regard, the Commission stated that

> [t]his decision does not foreclose general rate increases. It does establish a Commission policy which will de-emphasize the general increase. These powers include an ability to impose holddowns where necessary in a general increase proceeding....(Appendix C to Petition, page 30a).

As noted above, the Commission has, for a number of years and prior to the enactment of the 4-R Act, investigated particular commodities in general rate increase proceedings. Moreover, the 4-R Act does not contain any language depriving the Commission of its power or discretion to consider the reasonableness of an increase in rates on commodity groups in a general rate increase proceeding. Petitioners cite no language which supports a conclusion that the Commission's power in general rate increase proceedings has been diminished.

In summary, Petitioners' contention that the Commission has departed from "prior norms" is without merit. The Commission fully explained its reasons for the decision. Moreover, the Commission was properly continuing the exercise of its discretionary powers to review the justification of general rate increases on recognized commodity groups.

In essence, the Petitioners argue that the 4-R Act requires that the Commission only direct its review to the general revenue needs of the railroads, and that the Commission may make no other determinations in a general rate increase proceeding. This was not the law prior to the 4-R Act, and the enactment of the 4-R Act has not altered the Commissions's discretionary power to review the lawfulness of rates on particular commodities in a general rate increase proceeding.

III.

The Commission did not act arbitrarily in selecting certain commodities for investigation.

The Petitioners contend that the Commission's selection of particular commodities for investigation was arbitrary and without rational basis. However, the investigation was based on studies available to the Commission indicating that the seven commodity groups to be investigated were bearing a disproportionate share of Petitioners revenue needs, and the Commission's June 29, 1978 Decision and Order fully explained the Commission's use of the rate/cost ratios and how the particular commodities were selected.

> The railroads contend that selection of the commodities for investigation on the basis of rate/cost ratios is an arbitrary standard and will be utilized by the Commission as the sole criterion for judging the reasonableness of the rates under investigation. Most of their argument and supporting evidence is predicated on this basic premise. Certain parties characterize respondents' contention as a "strawman" argument designed to obscure the real issue before the Commission. Suffice it to say, that use of rate/cost ratios for the purpose of delineating areas in need of investigation is not indicative of an intent on the part of the Commission to transform this pre-investigatory tool into an arbitrary standard for the determination of reasonableness of rates. It is well settled that the scope of an investigation proceeding is within the discretion of the Commission. The rate/cost ratio is an appropriate tool for use by the Commission in determining what should be investigated. This does not imply any prejudgment of the lawfulness of the investigated rates on our part....(Appendix C to Petition, pages 31a-32a).

In regard to the Commission's use of the 1975 waybill sample, the Commission stated that

> While cost evidence is not the exclusive test of reasonableness it at least provides a standard by which to measure the extent to which the rate level deviates from the cost of providing the services and so is helpful in keeping this margin within reasonable bounds. Respondents have failed to set forth any relevant cost evidence (with the exception of newsprint. . .) to aid in evaluating the increases on the commodities in question. The railroads have argued vigorously against use of the rate/cost ratios contained in the Section 202 Study. They question the credibility of the study (footnote omitted) and yet they have supplied no competent cost evidence to take its place. In short, respondents have left us with no alternative by which to estimate the costs involved in transporting these commodities. It would appear they advocate that the Commission make a determination by evaluating the other factors which determine reasonableness, in a vacuum....(Appendix C to Petition, pages 33a-34a).

Clearly, the Commission's selection of certain specific commodity rates for investigation was not arbitrary and had a rational basis.

IV.

The Commission's investigation procedure was not a denial of the Petitioners' due process of law.

Petitioners contend that the Commission denied them two important procedural safeguards they have always been afforded in the case of challenges to individual commodity rates. First, Petitioners argue that the Commission, by instituting an investigation of specific commodity rates in a general rate increase proceeding, improperly shifted the burden of proof to the railroads. This argument is without merit in light of prior precedents in which the Commission, in general rate increase cases, has directed the railroads to consider both increases and decreases, in specific traffic, as a preferable method of securing revenue. *Fifteen Percent Case, 1931*, 178 I.C.C. 539, 577 (1931).

Secondly, the Petitioners argue that they were not accorded full opportunity and adequate time to prepare their evidence, particularly cost data, demonstrating that rates on the seven selected commodity groups were just and reasonable. The Petitioners voluntarily elected not to submit cost data, either in their original justification filed September 26, 1977 or in their response to the evidence submitted by PPG and other parties. The Petitioners limited their response to attacks upon the validity of the evidence submitted by the protestants, and now claim that they were granted insufficient time by the Commission to prepare a complete justification on the involved commodities. However, the initial order in the proceeding, served November 30, 1977, placed the Petitioners on notice that the further investigation of the particular commodities would rely upon cost evidence. It is difficult to imagine that the Petitioners, with their vast resources and numerous qualified technicians, could not have provided the necessary cost data within the time required by the Commission. Protestants did supply cost evidence within the equivalent time alloted to them. In light of these facts, the Petitioners' claim of lack of due process and violation of the provisions of the Administrative Procedure Act (5 U.S.C. § 556(d)) by the Commission should be disregarded.

Conclusion

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HENRY M. WICK, JR.,
CHARLES J. STREIFF,
WICK, VUONO & LAVELLE,
2310 Grant Building,
Pittsburgh, Pa. 15219,
Attorneys for Intervenor
PPG INDUSTRIES, INC.

Dated: November 21, 1978